No. 12020

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, as Trustee of the Estate of A. Moody & Co., Inc., Bankrupt,

Appellant,

vs.

H. L. BYRAM, Tax Collector for the County of Los Angeles, State of California,

Appellee.

APPELLANT'S OPENING BRIEF.

FRANK C. WELLER,
111 West Seventh Street, Los Angeles 14,

RUSSELL B. SEYMOUR,
1120 Rowan Building, Los Angeles 13.
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5207.

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I.

Statement of the Case.

This is an appeal from an order of a District Judge of the Southern District of California reversing an order of a Referee in Bankruptcy of that district in respect to the partial disallowance, to the extent of $5389.90 of a tax claim filed by appellee as an expense of administration in the total amount of $9,979.86. The order of the District Court allowed the claim as filed.

II.

Statement of Pleadings and Facts Showing Jurisdiction.

The bankruptcy was commenced on January 27, 1947, in the District Court of the United States, Southern District of California, Central Division, by the filing by A. Moody & Co., Inc., a corporation, the bankrupt herein, of an original petition under Section 322, Chap. XI of the Bankruptcy Act (11 U. S. C. A.), for an arrangement between the corporation and its creditors [Tr. p. 2]. Thereafter, and on the same day, the District Court approved of the petition and referred the matter generally to one of the referees in bankruptcy of that court [Tr. p. 12]. Th debtor, by order of the court, was permitted to remain in possession, and to carry on its business [Tr. p. 14], which order, however, was vacated on March 14, 1947, and a receiver was appointed [Tr. p. 19]. By order dated March 21, 1947, the debtor was adjudged bankrupt [Tr. p. 13] and George T. Goggin became the duly appointed, qualified and acting trustee in bankruptcy [Tr. p. 23]. On May 31, 1947, the appellee, H. L. Byram, as Tax Collector of the County of Los Angeles, filed in this proceeding his tax claim for $9,979.86, based on personal property owned by the debtor on the first Monday of March, 1947, and petitioned the court for its order directing payment "as a preferred claim" [Tr. p. 26]. The trustee filed objections to the allowance of the claim [Tr. p. 29], hearings were had, and an order was made by the referee reducing the claim to the amount of $4,589.96 and directing the trustee to make payment thereof [Tr. p. 30]. A petition for review of such order was filed by the appellee [Tr. p. 35] and the District Court, after hearing, set aside the order of the referee and allowed the claim in full

as filed as an expense of administration [Tr. p. 49]. Within the time provided by law, notice of appeal to the Circuit Court of Appeals, Ninth Circuit, was filed by appellant [Tr. p. 52].

Exclusive jurisdiction of proceedings in bankruptcy is vested in the Federal Courts. Section 2(a), Bankruptcy Act.

The District Courts have original jurisdiction of all matters and proceedings in bankruptcy. Section 41(19), Title 28, U. S. C. A.

The original petition herein was filed by the debtor under section 322 of the Bankruptcy Act (11 U. S. C. A. 722). Section 312(2) of the Bankruptcy Act (11 U. S. C. A. 712(2)) provides that the jurisdiction of the court shall be the same as though voluntary petition for adjudication had been filed and a decree had been entered at the time the petition under Chapter XI was filed. The debtor was adjudicated a bankrupt under the provisions of section 376(2) of the Bankruptcy Act and the proceedings were thereafter carried on pursuant to section 378(2) of the Bankruptcy Act (11 U. S. C. A. 788(2)). The provisions of Chapters I to VI of the Bankruptcy Act apply to proceedings under Chapter XI, where not inconsistent (Section 302, Bankruptcy Act (11 U. S. C. A. 702)).

This proceeding is a proceeding in bankruptcy, being the determination of a claim for the administration expense: and likewise is a matter involving in excess of $500.00.

Statutes under which the Circuit Court of Appeals is given appellate jurisdiction over this matter are as follows:

Section 316 of the Bankruptcy Act (11 U. S. C. A. 716), provides that where not inconsistent with the pro-

visions of Chapter XI, the jurisdiction of the appellate courts shall be the same as in a bankruptcy proceeding.

Section 225, subdivisions (a) and (c), Title 28, U. S. C. A., grants to the Circuit Court of Appeals appellate jurisdiction of the District Court interlocutory orders and over all controversies in the District Court relating to bankruptcy.

Section 24(a) of the Bankruptcy Act invests the Circuit Court of Appeals with appellate jurisdiction over proceedings in bankruptcy arising from courts of bankruptcy

III.

Opinion of the Court Below.

The District Judge did not render any opinion other than what might be contained in his order [Tr. p. 49]. The referee did not render any opinion other than what might be contained in his order [Tr. p. 30].

IV.

Statement of the Case.

(NOTE: In lieu of a reporter's transcript of the evidence, respective counsel agreed that the Statement of Evidence [Tr. p. 44], as set out in the Referee's Certificate on Review [Tr. p. 43], would suffice and reference to evidence will be made accordingly. No additional evidence was presented to the District Court.)

A. Moody & Co., Inc., the bankrupt herein, filed a petition for an arrangement under Section 322 of the Bankruptcy Act, on January 27, 1947, and on the same day an order was made herein "placing the debtor in pos-

session" and permitting it to operate its business which was the manufacture and sale of mattresses, and in which business it had been engaged for several months prior to the date of bankruptcy, at 5300 South San Pedro Street, Los Angeles, California. At the date of bankruptcy, at the same address, a portion of the premises were under lease to Haslett Warehouse Company into whose exclusive custody and possession a large quantity of personal property of the bankrupt had already been placed by the bankrupt, and against which personal property warehouse receipts had been issued by Haslett Warehouse Company in conformity to the provisions of the Warehouse Receipts Act of the State of California. Prior to the date of bankruptcy said warehouse receipts had been pledged by the bankrupt to secure an indebtedness owing by it in the sum of about $117,716.06 as of the date of bankruptcy and as of the tax date herein involved, to-wit, the first Monday in March, 1947, at 12 M., being March 3, 1947. The bankrupt had other personal property in its factory at the date of bankruptcy and on the tax date, some of which was similar to the warehoused goods. The assessor assessed all personal property, whether in the warehouse or in the factory, in one amount, to-wit: $126,950.00, the tax based thereon being $9,979.86. If the pledged property had been assessed separately the assessed value thereof would have been $88,118.00, and the tax based thereon would have been $5454.50. The order permitting the debtor to remain in possession was vacated March 13, 1947, at which time George T. Goggin was appointed receiver with authority to operate the business. On March 18, 1947, an order of adjudication was made and said George T. Goggin became trustee in bankruptcy with authority to operate the business, as of March 20,

1947. On April 12, 1947, substantially all of the personal property of the estate (excepting the pledged property) was sold for about $27,000.00. On June 20, 1947, the trustee filed his petition for authority to abandon said pledged property, which authority was thereafter granted, after due notice to all parties. At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee $992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of the goods so released), and nothing was ever realized by the estate from said pledged property. On April 4, 1947, Ralph Owen, chief accountant for the bankrupt, made, verified, and filed with the assessor on behalf of the trustee, the statement required by Section 8 of Article XIII of the Constitution of California and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "mdse. at 5300 S. San Pedro St. value $126,950. Cotton-Ticking-Mattresses, etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. pp. 44, 45, 46].

Thereafter on May 31, 1947, the appellee filed his claim for $9,979.86 in which he petitioned the Bankruptcy Court for its order directing the payment of said sum as a "preferred claim" [Tr. p. 26]. After a hearing of ob-

jections filed by the trustee, the referee made his order reducing the claim to the sum of $4,589.96 [Tr. p. 30]. The objections were tried on the theory that the first proviso of Section 64a(4) of the Bankruptcy Act applied to the property in the warehouse and the referee found that a portion thereof was based upon an assessment of $126,950.00, of which $88,118 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts and there was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that $992.82 thereof, at assessed valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released and subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property [Tr. p. 31].

The referee further found on April 4, 1947, Ralph Owen, chief accountant for the bankrupt herein, made, verified, and filed with the Assessor on behalf of the trustee of said bankrupt, the statement required by Section 8 of Article XIII of the Constitution of California

and by Section 441 of the Revenue & Taxation Code of California, showing as one item thereof "Mdse. at 5300 S. San Pedro St. value $126,950.00. Cotton-Ticking-Mattresses-etc." but the said statement was made without the sanction, approval, or direction of the referee in bankruptcy [Tr. p. 32].

The referee further found that the trustee prior to the hearing of these objections and pursuant to the order of the court sold all, or substantially all, of the remaining property included in said assessment for an amount greater than the amount of the total claim filed herein by said Tax Collector [Tr. p. 32].

The District Court, without any further evidence than has been adverted to above, set aside the order of the referee, made findings (a) and (b) of his order [Tr. p. 49] to the effect that the appellee had assessed a tax in the amount of $9,979.86 on all of the personal property of the bankrupt estate situated in Los Angeles County on the tax date, including certain personalty stored by the bankrupt with Haslett Warehouse Company at Los Angeles, prior to the petition in bankruptcy [Tr. p. 49], and that the assessment was in all respects accurate and made in accordance with the laws of the State of California [Tr. p. 50]. No other findings of fact were made by the District Court.

The District Court concluded that the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankruptcy "not to take over" the aforemen-

tioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. Section 102a(1) and 104a(1)) for taxes legally assessed and accruing after bankruptcy (*cf: In re Humeston,* 83 F. 2d 187 (C. C. A. 2d, 1936); *Robinson v. Dickey,* 36 F. 2d 147 (C. C. A. 3rd, 1929), cert. den. 281 U. S. 750 (1930)) [Tr. p. 50].

The District Court further concluded that the bankruptcy court, in approving a claim for taxes as an expense of administration, may review a tax assessment (see *Arkansas Corp. Commn. v. Thompson,* 313 U. S. 132 (1940) and *Gardner v. New Jersey,* 329 U. S. 565 (1947)); but may not, under Sections 62a(1) and 64a(1) of the Bankruptcy Act (11 U. S. C. Sec. 102a(1) and 104a(1)) reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by act of a quasijudicial officer or tribunal (*cf: Lyford v. City of New York,* 137 F. 2d 782 (56) (C. C. A. 2d 1943)) [Tr. p. 50].

The District Court then made its order that the appellee was entitled to full payment of the $9,979.86 claim against the bankrupt estate for personal property taxes as an expense of administration (Bankruptcy Act, Sections 62a and 64a(1); 11 U. S. C. Sec. 102a(1) and 104a(1); 3 *Collier on Bankruptcy,* pp. 1509-1519, 2077-2082) [Tr. p. 51].

V.
Questions Presented.

I.

Whether the bankruptcy court has the power and right, in fixing an expense of administration, to eliminate personal property taxes assessed by the County Assessor on pledged personal property which never came into possession of the bankrupt estate and in which no equity existed at the date of bankruptcy or thereafter, where in the course of administration other personal property, included in the same assessment, was sold for an amount greater than the total assessed taxes.

II.

Did the order of abandonment of the foregoing personal property eliminate any tax liability that otherwise might have existed as an expense of administration.

III.

Did the District Court err in failing to adopt the findings of the referee in bankrupty.

IV.

Did the District Court err in its conclusion of law that the appellee is entitled to full payment of its claim as an expense of administration and in its order vacating the order of the referee in bankruptcy.

VI.
Specifications of Error.

Statement of points upon which appellant intends to rely upon appeal are set forth at pages 53-55 and 58 of the transcript. Each of said points is relied upon by appellant and such points are as follows:

I.

That the District Court erred in failing to find (if it did make independent findings or failed to adopt the findings of the referee in bankruptcy) as follows:

> "Thereafter (after March 18, 1947) H. L. Byram, County Tax Collector for Los Angeles County, asserted a tax claim as an expense of administration against the trustee herein in the amount of $9,-979.86. A portion thereof was based upon as assessment of $126,950.00, of which $88,118.00 of that amount represented materials which never came into the possession of the trustee of the bankrupt estate, the same at all times being in the exclusive control of Haslett Warehouse Company upon premises leased by it and against which property there were issued, outstanding warehouse receipts. There was not at bankruptcy or at any later time any interest or asset of value in the property in the possession of the Haslett Warehouse Company and the trustee was not permitted to take over, or to assume, the same as an asset, excepting only that $992.82 thereof, at assesesd valuation, was released to the trustee after the tax date upon payment by him to the pledgee of the warehouse receipts of the reasonable value of such goods so released. Subsequently in the administration of the bankrupt estate, the trustee was directed by proper order of this court to abandon, and did abandon the balance of the warehoused property."

in that same is contrary to the evidence.

II.

That the District Court erred in its conclusion of law as follows:

> "That the referee's order of abandonment dated August 20, 1947—which directed the trustee in bankrupty 'not to take over' the aforementioned property stored in the Haslett Warehouse—did not affect the liability of the bankrupt estate under Sections 62a (1) and 64a(1) of the Bankruptcy Act (11 U. S. C. 102a(1) and 104a(1) for taxes legally assessed and accruing after bankruptcy."

in that same is contrary to the law and not supported by the evidence.

III.

That the District Court erred in its conclusion of law that the bankruptcy court may not, under the foregoing sections reduce or disallow a claim for taxes legally assessed under the laws of the State of California when such tax or a portion thereof is based upon an assessment arising after the date of bankruptcy upon property which never came into the possession of the estate in bankruptcy and from which nothing was realized by the estate and which after the tax date was abandoned by the trustee upon order of the court, the estate at no time having any interest of value in such property. The foregoing conclusion of law is contrary to the law and is not supported by the evidence.

IV.

That the District Court erred in its conclusion of law that the claimant is entitled to full payment of the $9,-979.86 claim against the bankrupt estate for personal property taxes as an expense of administration, in that same is contrary to the law.

VII.

Summary of Argument.

POINT I. The Bankruptcy Court had the power and right to eliminate taxes on personal property in which the bankrupt estate had no interest and which did not come into the possession of the bankruptcy court, even though there was other personal property of value in the estate.

A. Jurisdiction to reduce tax claims under present facts is in the bankruptcy court.

B. The subject property did not come into possession of the bankruptcy court.

C. There was no value to the interest of the bankrupt estate in the property.

D. To consider other property in determining the value of the interest of the bankrupt estate is to emasculate the first proviso of Section 64a(4).

POINT II. Assuming, but not conceding, that such property was subject to taxation arising after bankruptcy, the order of abandonment relieved the estate of liability.

POINT III. The District Court erred in not accepting the findings of the referee (if such was the case).

POINT IV. Is dependent upon Points I, II and III and is not independently discussed.

VIII.
ARGUMENT.

POINT I. The Bankruptcy Court Had the Power and Right to Eliminate Taxes on Personal Property in Which the Bankrupt Estate Had No Interest and Which Did Not Come Into the Possession of the Bankruptcy Court, Even Though There Was Other Personal Property of Value in the Estate.

A. Jurisdiction to Reduce Tax Claims Under Present Facts Is in the Bankruptcy Court.

The basis for jurisdiction in respect to tax claims and claims of administration are derived from Section 64a of the Bankruptcy Act which, so far as material, reads as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) . . .; the costs and expenses of administration . . .; . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any sub-division thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . ."

and Section 62a of the Bankruptcy Act which reads as follows:

> "The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and ex-

amined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estate in which they were incurred."

The District Court properly ruled "That the Bankruptcy Court, in approving a claim for taxes as an expense of administration, may review a tax assessment," citing *Arkansas Corporation Commission v. Thompson,* 313 U. S. 132 (1940) and *Gardner v. New Jersey,* 329 U. S. 565 (1947), but in our opinion, erroneously concluded that the Bankruptcy Court "may not, under Sections 62a(1) and 64a(1) of the Bankruptcy Act, reduce or disallow a claim for taxes legally assessed under the laws of the taxing sovereign, irrespective of whether or not the assessment has been approved by judicial decree or by the act of a quasi-judicial officer or tribunal," citing *Lyford v. City of New York,* 137 F. 2d 782 (C. C. A. 2d 1943).

It will be noted that nowhere does the District Court make even passing reference to the provisions of 64a(4) or particularly to the first proviso thereof:

> "*Provided,* That no order shall be made for the payment of a tax assessed against any propery of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court:"

Before we analyze the authorities of the District Court may we emphasize

(1) That the referee did not attack the valuation of the property assessed by the Tax Collector.

(2) That the referee did not reduce or modify the tax rate used by the assessor.

(3) That the referee only followed the *first proviso* of Section 64a(4).

The essence of *Arkansas Corporation Commission v. Thompson* and of *Gardner v. State of New Jersey* are contained in the following quotations from the latter.

> "Third. We held in *Arkansas Corporation Commission v. Thompson, supra,* that the reorganization court lacked the power under Section 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings which afforded ample protection to the railroad's rights. We adhere to that decision. Its ruling precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. It may not therefore entertain the objections to New Jersey's claim which tender those issues. The proper tribunals where those issues may be litigated, if they are still open for any year, are the state agencies and courts and, under special circumstances, the federal courts."

> "Fourth. The rule of *Arkansas Corporation Commission v. Thompson, supra,* does not, however, preclude the reorganization court from adjudicating the other issues raised by the objections to New Jersey's claim. The contrary view, which the Circuit Court of Appeals apparently took, fails to recognize historic bankruptcy powers which, as we have already pointed out, are part of the arsenal of authority granted the reorganization court by Section 77.

> (1) The validity and priority of one lien, whether or not claimed by a State, as against other liens, are questions for the reorganization court. Illustrating

but not limiting the range of that inquiry are questions whether local law creates the lien asserted: whether it was sufficiently perfected prior to the petition for reorganization as to be good against other liens, *cf. New York v. Maclay, supra; United States v. Texas, supra;* whether, if it were inchoate at that time, it could be perfected subsequent to the petition, *Lyford v. State of New York,* 140 F. 2d 840; and whether the lien, though paramount, is subordinate to administration expenses or other claims under either the general bankruptcy rule, *City of New York v. Hall,* 139 F. 2d 935, or the equity rule, 5 Collier on Bankruptcy (14th ed.) 77.21. See *Warren v. Palmer,* 310 U. S. 132.

(2) The extent of the lien—to what property it applies, and whether it is restricted to realty or covers personal property or revenues as well—are also questions for the reorganization court. See *Ecker v. Western Pacific R. Corp., supra,* pp. 489, 503.

(3) The reorganization court may also adjudicate questions pertaining to the amount of a tax claim secured by a lien without crossing the forbidden line marked by *Arkansas Corporation Commission v. Thompson, supra.* There is, for example, the question whether the amount of the claim has been swollen by the inclusion of a forbidden penalty and thus to that extent does not meet the bankruptcy requirements for proof and allowance of claims. Section 57j of the Bankruptcy Act provides that debts owing a State as a 'penalty or forfeiture' shall not be allowed. What claims accruing before bankruptcy and sought to be proved by a State are 'penalties', *New York v. Jersawit,* 263 U. S. 493, and what are not. *Meilink v. Unemployment Reserves Commission,* 314 U. S. 564; the applicability of Section 57j to reorganizations under Section 77; the liability of the estate for pen-

alties incurred by the trustee in the operation of the business; *Boteler v. Ingels,* 308 U. S. 57; what interest, if any, accrues after the petition for reorganization has been filed, *Vanston v. Green,* 329 U. S. ....., are all questions for the reorganization court."

The Supreme Court, in the *Gardner* case, followed substantially *Lyford v. City of New York, supra,* cited by the District Court.

"Moreover, the questions here involved are questions of law. The trustee asserts that all but a trivial amount of the tax is levied on nontaxable items as follows: Amounts owed the company by its subsidiaries as interest, but unpaid because it had not paid rentals due the subsidiaries, and hence amounts resulting at most from mere bookkeeping entries in the company's accounts, *Southern Pac. Co. v. Lowe,* 247 U. S. 330, 337, 338, 38 S. Ct. 540, 62 L. Ed. 1142; income from tax-exempt securities deposited with the Industrial Commissioner as security for the company's obligations under the Workman's Compensation Act; and demurrage receipts of the debtor, not taxable locally, since they came from interstate shipments of merchandise into New York. Also included were penalties of $4,427.77, which are improper if Section 57j applies to these proceedings—a matter upon which lower federal courts are not in accord. Compare *In re Denver & R. G. W. R. Co., supra* (D. C., Colo.), 40 Am. B. R. (N. S.) 520, 27 F. Supp. 983, with *In re Chicago, M., St. P. & P. R. Co., supra.* It would appear, therefore, that in any event these are not issues reserved to the state authorities, under the *Thompson* decision."

Lyford v. City of New York, 137 F. 2d 782 (C. C. A. 2d 1943).

The Tax Collector subjected himself to the effect of the *first proviso* by filing his claim. See *Gardner v. State of New Jersey, supra.*

> "When a State files a proof of claim in the reorganization court, it is using a traditional method of collecting a debt. A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney v. Dresser,* 200 U. S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization. Without that sifting process, unmeritorious or excessive claims might dilute the participation of the legitimate claimants.
>
> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. *Wiswall v. Campbell,* 93 U. S. 347, 351. If the claimant is a State the procedure of proof and allowance is not transmuted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res.* It is none the less such because the claim is rejected *in toto,* reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files

a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim. See *Clark v. Barnard,* 108 U. S. 436, 447-448; *Gunter v. Atlantic Coast Line,* 200 U. S. 273, 284, 289; *Missouri v. Fiske,* 290 U. S. 18, 24-25."

Just as the Bankruptcy Court may determine any of the numerous items cited as expenses in the *Gardner* case, even though a quasi-judicial body has determined a tax, so may, *so must,* the Bankruptcy Court determine what is the interest of the bankrupt estate in the property which is the subject of the tax. We know of no agency or tribunal other than the Bankruptcy Court with authority to make such a determination. We know of no statute in California that permits taxation of an *equity* of a taxpayer.

B. The Subject Matter Did Not Come Into the Possession of the Bankruptcy Court.

The property was not in the possession of the Bankruptcy Court or of any officer thereof, or of the debtor, on either the tax date or at any time from before bankruptcy.

It is possible that the District Court assumed the expression "debtor in possession" (which was the status of the bankrupt on the tax date) to mean that the debtor was physically in possession of the property. At all pertinent times the property was in the exclusive control of Haslett Warehouse Company upon premises leased by it and

against which property there were issued outstanding warehouse receipts pledged before bankruptcy. See:

8 *Collier*, 796.

"Where a debtor continues 'in possession of his property' pursuant to Section 342, it does not mean that he is entitled to possession of all his property regardless of who possessed it when the petition was filed. It means rather that the debtor continues in possession of the property of which he had possession when the petition was filed, and that he may acquire possession of property which he is entitled to possess. Nothing in Section 342 is warrant for disturbing the possession of a third party, such as a pledgee, who is lawfully in possession of the property of the debtor."

C. There Was No Value to the Interest of the Bankrupt Estate in the Property.

The evidence is clear in this respect and we believe the appellee will not controvert this point.

At no time on or after the date of bankruptcy was there any interest or asset of value for the bankrupt estate in the pledged goods, and neither the debtor, nor the receiver, nor the trustee ever took any part of the pledged goods into his possession (excepting that after the tax date there was released to the trustee $992.82 at assessed valuation of such goods upon payment by the trustee to the pledgee of the warehouse receipts, of the reasonable value of the goods so released), and nothing was ever realized by the estate from said pledged property [Tr. p. 45].

D. To Consider Other Property in Determining the Value of the Interest of the Bankrupt Estate Is to Emasculate the First Proviso of Section 64a(4).

Section 64a of the Bankruptcy Act of 1898 was as follows:

> "a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount of legality of any such tax the same shall be heard and determined by the court."
>
> 9 *Collier* p. 1819 Appendix.

Numerous inequities appeared which required tax payments to be made on *real* property without value to the bankrupt estate. (3 Collier p. 2047, 1926 Amendments.) Section 64a, by Act of May 27, 1926, 44 Stat. 662, was amended to read:

> "a. The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, County, district, or municipality, *in the order of priority as set forth in paragraph (b) hereof: Provided, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be*

credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." 9 *Collier* p. 1819 Appendix.

In 1938 the section was amended by striking out the word "real" so that the section, since 1938, has read:

". . . Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court; . . ." 3 *Collier* p. 2049, 1938 Act (4).

Progressively, it will be noted, the right of taxing authorities was limited. From 1898 to 1926 any and all property taxes were payable; from 1926 to 1938 taxes on *real* property were payable only to an amount "in excess of the value of the interest of the bankrupt estate therein as determined by the court"; in 1938 the same rule became effective in respect to "any property of the bankrupt estate."

It was the contention of appellee in the District Court, not passed on directly, however, that because other property of the bankrupt estate was sold for more than the amount of the tax *on the pledged property* and the *other property,* the total assessed tax should be paid.

We have found no cases on this point by this court.

There are two cases from other Circuits cited by appellee in the Court below, *Glass v. Phillips,* 139 F. 2d 1016 (5th C. C. A.) and *Matter of Ingersoll Co.,* 148 F. 2d 282, which apparently are contrary to the position of the appellant here.

Glass v. Phillips involved *personal* property taxes which arose, apparently, prior to the 1938 Amendment to Section 64(4). In any event, the court referred to the 1926 Amendment as the basis for its opinion. However, it does arrive at a result opposed to the contention of the appellant, and construes the 1926 amendment in the same fashion.

Matter of Ingersoll Co., supra, also construes the *first* proviso in similar manner, although the court did indicate that no showing had been made by the trustee in that case that the tax involved exceeded in amount the value of the interest of the bankrupt in the land covered by the tax sale certificate in controversy.

Although confessing a probable inability to distinguish either the *Glass* or *Ingersoll* cases, we do not hesitate to contend that irrespective of the holding in either of them, they do not set out either what the *first proviso* directly and expressly commands or what was the undoubted intention of Congress when it passed first the 1926 amendment and then the 1938 amendment, *to reduce tax payments on property of no value to the bankrupt estate.* The 1926 amendment applied merely to *real* property; the 1938 amendment applied to any property, *real* or *personal.*

Yet, if the rationale of the above holdings be adopted, bankruptcy estates will be in the same situation as existed prior even to the 1926 amendment, a tax must be paid on property in which the bankrupt estate has no interest of value. WHY HAVE THE AMENDMENT?

POINT II. Assuming, but Not Conceding, That Such Property Was Subject to Taxation Arising After Bankruptcy the Order of Abandonment Relieved the Estate of Liability.

The District Court concluded that the order of abandonment of the warehouse property did not affect the liability of the bankrupt estate under Sections 62a(1) and 64a(1) of the Bankruptcy Act for taxes legally assessed and accruing after bankruptcy, and cited as authority *In re Humeston,* 83 F. 2d 187 (C. C. A. 2d 1936) and *Robinson v. Dickey,* 36 F. 2d 147 (C. C. A. 3d 1929), cert. den. 281 U. S. 750 (1930).

A reading of the *Humeston* case will disclose that payment of the taxes was ordered *because the trustee had occupied and used the property involved, and as an expense for use and occupation and only for the period that he used the property,* and further that the court neither ordered nor permitted the abandonment of the property involved.

A reading of the case of *Robinson v. Dickey* discloses a similar situation arising from controversy between bond holders and the trustee in bankruptcy over payment of costs of operation where the trustee was actually and physically in possession of the property and making use thereof for the benefit of the general creditors.

In the instant case neither the debtor, the receiver, nor the trustee, ever had the use of, or had possession of, or realized anything from, the property in question.

A recent case in California, *Helvey v. United States Building & Loan Ass'n,* 81 Cal. App. 2d 647, lays down the accepted rules regarding the abandonment.

> "When assets have been abandoned by a trustee or a receiver, the property, in so far as the abandoner is concerned, is left as though he had never owned

or claimed it and the 'title stands as if no assignment had been made.'

The situation presented is analagous to an unaccepted or a rejected gift—the title is left as though the gift had not been made (*Brown v. Keefe,* 300 U. S. 598, 81 L. Ed. 827; *In re Webb,* 54 Fed. 2d 1065; *In re Moss,* 21 Fed. Supp. 1019). . . . (742) Either a receiver or a trustee has the right to determine whether the assets are so burdensome or of such little value as to render the administration of the same unprofitable, and if he so determines, the court may upon his petition authorize the abandonment of the worthless property."

POINT III. The District Court Erred in Not Accepting the Findings of the Referee (if Such Was the Case).

We are not certain that the District Court did refuse to accept the findings of the referee but the order, by implication, might indicate that such was the case. In view of the fact that there is no controversy as to the evidence before the referee and no additional evidence was received by the District Court we do not elaborate further, since the findings of the referee shall be accepted unless clearly erroneous. *General Order No. 47.*

POINT IV. That the District Court Erred in Its Conclusion of Law That the Claimant Is Entitled to Full Payment of the $9,979.86 Claim Against the Bankrupt Estate for Personal Property Taxes as an Expense of Administration, in That Same Is Contrary to the Law.

The foregoing point is, of course, dependent upon the validity of Points I, II and III, and is not independently discussed.

Conclusion.

The appellant respectfully urges that this Honorable Court should construe the *first proviso* of Section 64a(4) with a view of determining and effectuating the obvious intention of the Congress when it enacted, respectively, the Amendments of 1926 and of 1938, and that, regardless of the rulings of other Circuit Courts, and until such time as the Supreme Court of the United States has ruled adversely, this Court should hold that the Referee in Bankruptcy made a correct decision; and reverse the order of the District Court below.

Respectfully submitted,

FRANK C. WELLER and
RUSSELL B. SEYMOUR,
Attorneys for Appellant.